IN THE

Supreme Court of the United States

October Term, 1963

No. 216

S. ROBERT TRALINS, for himself and "PLEASURE WAS MY BUSINESS" as a book,

Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Third District, State of Florida, entered in the above-entitled cause on March 19, 1968 and made final, upon the denial of the petition for rehearing, on April 8, 1968.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal denying petitioner's and respondent's interlocutory appeal

CERTIFICATE OF SERVICE

I, RICHARD YALE FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on June 26, 1963, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent and on cross-appellant below by mailing a copy thereof in a duly addressed envelope with postage prepaid to each of the following, to wit, GLENN C. MINCER, Assistant State Attorney, State Attorney's Office, Dade County Courthouse, Miami, Florida, and to Honorable RICHARD W. ERVIN, Attorney-General of Florida, Tallahassee, Florida (air mail postage prepaid), attorneys for Respondent, and to JOSEPH P. DURANT, Seybold Building, Miami 32, Florida; and to DANIEL L. GINSBERG, 566 N. E. 15th Street, Miami, Florida, attorney for cross-appellant below.

RICHARD YALE FEDER
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Counsel for Petitioner.

APPENDIX

[TITLE OMITTED]

District Court of Appeal, Third District

Opinion filed December 18, 1961.

Interlocutory Appeals from the Circuit Court for Dade County, Lucian C. Proby, Jr., Judge.

Glenn C. Mincer and Joseph N. Durant, Jr., for Richard E. Gerstein.

Dixon, Simon & Rosenthal, Daniel Ginsberg and N. J. Durant, for "PLEASURE WAS MY BUSINESS", et al

Before PEARSON, C. J., and HORTON and BARKDULL, JJ.

PER CURIAM.

In case #61-660, appellant Gerstein seeks review of an order denying his motion for a summary decree in an action seeking to have the book "Pleasure Was My Business" declared obscene within the meaning of § 847.01, Fla.Stat., F.S.A. It should be noted that we are not here called upon to decide the effect on this or similar cases of Chapter 61-7, Laws of Florida, Regular Session, 1961, which was passed while this action was pending and which repealed § 847.01, Fla.Stat., 1959.

The trial court stated in its order that it was prevented from entering a summary decree by the presence of a genuine issue of material fact, the obscene character of the book, which it felt should be judged by the court sitting as a trier of fact upon the presentation of testimony of expert witnesses to establish and prove the contemporary community standards in Dade County by which obscenity should be measured.

torney, as well as to bring the "Ghost Writer" and the Publisher into the action. As the cause proceeded a temporary injunction was entered enjoining a book store and its operators as Defendants. Perhaps the opening conduct of the State Attorney was such as to raise some suspicion of collusion, but later events dispelled this. Consequently, the contention of collusion and impropriety between the State Attorney and his assistant, ARAM GOSHGARIAN, has not been proved and is rejected.

Most important is the contest here existing between the parties as to whether or not the defendant-book is an obscene literary work. Striving to ascertain the answer to this question, the Court examined the testimony of the witnesses, examined the United States Supreme Court cases setting forth the requisites, read the defendant-book twice, and advised itself of the pertinent Florida Statutes. At the outset, the Court is aware that Florida Statute 847.011 is the applicable Florida law relating to obscene literature. This Statute is penal in nature and hardly enlightened the Court as to the legal requirements in determining what is or what is not obscene. Consequently, a higher source had to be found.

The law outlined in the now historic Roth vs. U. S., 77 Sup. Ct., 1304, clearly establishes the ingredients required and to be applied so as to answer the question here posed. The rule therein laid down is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest?" If the answer be "yes", it is obscene; if "no", it is not obscene. The expression in that statement which most requires definition is "prurient interest". Defined, this expression

means: impure in thought or desire; to incite lascivious thought or desire. Thus defined, this Court then proceeded to analyze the other elements of this profound statement. It occurred to the Court that "average man" and "contemporary community standards" have an affinity and to some degree are synonymous. To find the contemporary community standards would aid greatly to pinpoint the composite individual known as an average man. By this, the Court means that if a majority of citizens in a certain defined locality like baseball, the average man is a baseball fan and this liking becomes an element of the contemporary community standards. Using the experience, knowledge and varied associations of the Court with the people of the community, together with the testimony of the experts presented, the Court concludes that the contemporary community standards holds that the mores of morality are not consonant with promiscuous flaunting of abnormal, unusual and/or perverted sex practices as is the continuing theme of this book. This finding is certainly mindful of the fact that the County of Dade is composed of a variety of localities, one of which, Miami Beach, represents no more than 7% of the population of this County and cannot be concluded to have established the standards for the whole community. This observation is herein made referable to certain testimony relating to practices on Miami Beach, an area almost exclusively catering to the desires and pleasures of a predominantly transient populace. This reference is not made to single out a particular locality of different community standardards, but to point out that contemporary moral standards are composed of all those of this jurisdiction, and not just one isolated area. Interestingly enough, two of the most important defense witnesses reside on Miami Beach.

Witness the writing itself—as hereinbefore stated the book was read twice by the Court. Also numerous excerpts from it were read directly into the record and as a statistical recitation made by one witness as to the occurrence of phrases and words that certainly are foreign to most vocabularies and would usually in conversations only be used either with or by women of ill fame and in places they inhabit, to-wit: "dirty road", "around the world", "three way broad", "wet deck", and "blow storm". The book is resplendent from cover to cover with descriptions of indecent scenes and conversations supposedly having happened at the Moorish Castle or Madam Sherry's other flesh selling godowns. The exhibits of the Defendants, some being great works of literary art, have passages exuding intimate sexual description. A number of these contain violent and highly sensual descriptions of act and dialogue that would burn the ears and eyes of many citizens. Such books as "God's Little Acre" by Caldwell, "East of Eden" by Steinbeck, "Sanctuary" by Faulkner, and others, contain passages that deal with intimate affairs between man and woman at its rawest, or language known best to certain sailors. But none of these works in evidence, in the opinion of this Court, from cover to cover constantly dominate the whole book with such a vile and obscene sexual theme as to bring them within shouting range of the subject of this litigation. The Court cannot escape the conclusion that racy, immoral, unlawful, vile, unnatural, abnormal and disgusting sex practices is the dominant theme of "PLEASURE WAS MY BUSINESS"—arguments for expose of political graft, corruption and a theme of condemnation of prostitution with its attendant evils to the females who participate, not withstanding. In passing, it has occurred to the Court that the more modern trend of literature

dealing with eroticism, that fails to pass the test of obscenity, deals with relations of man and woman completely devoid of feeling, love or tenderness. These works lacking true feeling of the participants for each other, which still are outside the Supreme Court test, have only isolated passages touching on obscenity and have dominant themes other than simply dirty sexual depicturing.

The question of protection afforded by the First Amendment to the United States Constitution and the 13th Declaration of Rights of the Florida Constitution is, of course, a basic right diligently protected by the courts of this State. Exceptions, however, to this jealously guarded constitutional guarantee do exist. One such exception is obscenity as defined in the law. Consequently based upon the cited Roth case, no person has any right under the guise of freedom of speech or press to sell or distribute obscene material, for obscenity has never enjoyed the protection of either the State or Federal Constitutions.

Having determined the dominant theme to be base as depicted (even though alleged to be historically true); having found the contemporary community standards to be high enough that the average man does possess morals against practices recited in the defendant-book, now the Court turns to consider if such dominant theme appeals to the prurient interest of this average man. None of the witnesses were average. All were decidedly above average who expressed expert opinions. To most of them, as well as the Court, the defendant-book was revolting and appealed to the opposite of their prurient interest. As stated above, this wispy fellow is a figure created by the law, just as the reasonable man of tort

ute, transmit, show or transmute the defendant-book, "PLEASURE WAS MY BUSINESS", or any facsimile or copy thereof within the jurisdiction of this Court.

2. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from printing, publishing or uttering any advertisement within the jurisdiction of this Court, giving information, directly or indirectly, stating or purporting to state, where, now, of whom, or by what means the defendant-book, "PLEASURE WAS MY BUSINESS" or any facsimile or copy thereof, can be purchased, obtained or had.

3. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from bringing, importing, or transporting into Dade County, Florida, or exporting from Dade County, Florida, by mail, express company, common or private carrier or by any means whatsoever, the defendant-book, "PLEASURE WAS MY BUSINESS", or any facsimile or copy thereof.

4. That the Defendants, separately and severally, be and they are hereby permanently prohibited and enjoined from counseling, hiring, aiding, or abetting any person, agent, clerk, employee, firm, association, partnership or corporation to do or commit any of the acts or things prohibited, enjoined, and enumerated in this final decree.

5. That this Court retains jurisdiction of this cause, the parties and subject matter hereof for such other and further proceeding as may be required by law or equity.

DONE AND ORDERED in the Court House at Miami, Dade County, Florida, this 30 day of March, 1962.

LUCIEN C. PROBY, JR.
Circuit Judge

(Title Omitted)

ORDER DENYING DEFENDANT S. ROBERT TRALINS' PETITION FOR REHEARING

This cause coming on to be heard this date upon defendant S. Robert Tralins' petition for rehearing, and after argument of counsel, examination of the pleadings, and due consideration, it affirmatively appears that the petition for rehearing does not set forth any omissions, oversights, causes or grounds which have not heretofore been considered by this Court and stated in the Final Decree. It is, therefore,

ORDERED AND ADJUDGED that the said petition for rehearing be and is hereby denied.

DONE AND ORDERED in Chambers, Dade County Courthouse, this _____ day of April, A. D., 1962.

LUCIEN C. PROBY, JR.
Circuit Judge

mined the record and found that, re-
fect on this suit of the repeal of § 847.01
e enactment of § 847.011, the allega-
plaint and the evidence offered in sup
more than sufficient to bring this suit
iction of the court under the provisions
ry judgment act, Chapter 87, Fla.Stat.,

urther contends the trial court erred in
ect book to be obscene. We disagree.

nity has never enjoyed the protection of
ral or State Constitutions, no person has
the guise of freedom of speech or press,
or distribute obscene material. See Roth
e, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d
rous cases cited therein; see also Rachleff
App.1960), 124 So.2d 878. The test of ob-
her to the average person, applying con-
mmunity standards, the dominant theme of
aken as a whole, appeals to the prurient
is to say, arouses lascivious or lustful
h v. United States, supra; Rachleff v.
see also § 847.011, supra. It is for the trier
o determine the contemporary community
which obscenity should be measured and,
standards and the test set forth above,
whether or not a given publication is in
Gerstein v. Pleasure Was My Business,
136 So.2d 8; Rachleff v. Mahon, supra; State
1957, 93 So.2d 876. An appellate court will
its judgment on these questions for that
f fact absent a compelling reason to do so
he record. See Rachleff v. Mahon, supra.

Reverting to the case at bar, the trier of fact, in this instance the trial court, examining the evidence as a whole, applied the proper test and concluded that the subject book was obscene. There is nothing in this record that would cause us to disagree with its conclusion.

Accordingly, the final decree appealed is affirmed.

Affirmed.

[TITLE OMITTED]

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER

Clerk District Court of
Appeal, Third District

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend,
or transmute, or ha
with intent to sell,
show, transmute, or
lewd, lascivious, f
masochistic book,
paper, comic book,
or article, writing
graph, motion pic
record, or wire or
printed, or recorde
may or may not re
transmuted into a
tions of such char
indecent or immor
or immoral use o
copies, draws, pho
lishes, or in any
prepares any such
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kind, giving info
or purporting to
means any, or w
matter, article,
purchased, obtain
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or assist in doin
act or thing mer
and shall be puni
not exceeding on
or both. A perso
violation of this

provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody or control any obscene lewd lascivious filthy indecent immoral sadistic or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding $500.00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, alloca-

tion, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,00.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

judge shall be satisfied that sufficient notice of the application therefore has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition of motion picture films permitted by § 521.02.

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations. Laws 1961, c. 61-7, §§ 1-11.